

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

IN RE: DEPARTMENT OF JUSTICE)	
SUBPOENA DUCES TECUM TO)	
CUSTODIAN OF RECORDS FOR)	No. 04-MC-018 DV
BAPTIST MEMORIAL HOSPITAL)	

ORDER DENYING MOTION OF BAPTIST MEMORIAL HEALTHCARE CORPORATION
FOR AN ORDER QUASHING SUBPOENA AND GRANTING MOTION FOR A
PROTECTIVE ORDER

Before the court is the motion of Baptist Memorial Healthcare Corporation for an order quashing an administrative subpoena from the Department of Justice which seeks records related to the hospital privileges of Dr. Rande Lazar. Dr. Lazar is a defendant in a pending criminal proceeding for healthcare violations. As grounds to quash the subpoena, Baptist relies on Tennessee's physician peer review privilege, the attorney-client privilege, and patient privacy rights. In the alternative, Baptist seeks a protective order of non-disclosure or redaction. For the reasons that follow, the motion to quash is denied, and the motion for protective order is granted.

In January of 2004, the grand jury for the Western District of Tennessee returned an indictment charging Dr. Lazar with devising and executing a scheme to defraud and obtain money from health care benefit programs. The United States alleges that Dr. Lazar

falsified or caused to be falsified medical reports to justify billing and billed for procedures that were not performed by him, were not necessary, or were not performed at all.

At the time of his indictment, Dr. Lazar had privileges to practice at Methodist Hospital, LeBohneur Childrens Medical Center, St. Francis Hospital, and Baptist Memorial Hospital. After the indictment was returned, Baptist suspended Dr. Lazar's privileges. Baptist then convened a Medical Staff Executive Committee inquiry to conduct a physician peer review. Dr. Lazar appeared and addressed the committee. Thereafter, Baptist restored Dr. Lazar's privileges subject to certain conditions and restrictions.

On April 20, 2004, the government issued a subpoena duces tecum to the custodian of records for Baptist seeking "all records (unredacted) of each and every meeting, gathering, assembly, and discussion regarding Dr. Rande Lazar's privileges at the hospital(s)." (Mot. of Baptist, Ex. 1.) The subpoena defined records as "all transcripts, recordings, documents, files, minutes, e-mail, handouts, mailings, contracts, agreements, and correspondence." (*Id.*)

In its response to Baptist's motion to quash, the United States has narrowed the scope of the subpoena and now only requests the following categories of records: (1) documents related to statements and representations by Dr. Lazar, his counsel or other

representatives; (2) documents, reports and handouts relied on by Dr. Lazar to support his position for reinstatement; and (3) reports, records, opinions and documents provided by others for consideration by the peer review committee. The United States has made clear that it does not seek any information that is either attorney-client privileged or attorney work product. (Resp. of U. S. at 7.)

The critical issue is whether the information sought by the United States is protected as privileged under the Tennessee Peer Review Law of 1967. The Tennessee Peer Review Law of 1967 provides that all information, reports, statements, memoranda or other data furnished to or generated by a committee, and any findings, conclusions or recommendations resulting from the proceedings of such committee are privileged. Tenn. Code Ann. § 63-6-219(e). The physician peer review privilege is a statutorily created state law privilege, and this is a case of federal jurisdiction.

Privileges in federal cases are governed by Rule 501 of the Federal Rules of Evidence which states:

Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience

F.R.E. 501. In federal question cases, questions of privilege are governed by federal common law. *Reed v. Baxter*, 134 F.3d 351, 355 (6th Cir. 1998). The weight of authority is that there is no physician peer review privilege under federal common law. See, e.g., *Univ. of Pa. v. Equal Employment Opportunity Comm'n*, 493 U.S. 182, 189 (1990) (finding that an academic peer review privilege had no historical basis in the federal common law); *Nilavar v. Mercy Health Sys.-Western Ohio*, 210 F.R.D. 597, 601-603 (S.D. Ohio 2002) and cases cited therein.

To determine whether to recognize a state evidentiary privilege, the federal courts engage in a balancing process. The court must weigh the state's interest in confidentiality of physician peer review proceedings against the evidentiary need for disclosure of relevant and probative information. *Nilavar*, 210 F.R.D. at 607-608; *LeMasters v. Christ Hospital*, 791 F. Supp. 188 (S.D. Ohio 1991).

The purpose of Tennessee's Peer Review statute is to candidly and objectively evaluate and review a physician's professional conduct, competence, and ability to practice medicine. Tenn. Code Ann. §63-6-219(b)(1). It goes without saying that confidentiality of peer review committee proceedings is important to the process. *Id.* On the other hand, the needs of the federal government in this instance is to punish physicians who perpetrate frauds on the

government and on patients. Statements made by Dr. Lazar and his attorneys and information provided to Baptist's Medical Staff Executive Committee to persuade the committee to restore his privileges may be highly relevant and probative to the issues involved in the criminal prosecution of Dr. Lazar. This is not a medical malpractice case, and the government is not interested necessarily in the findings or determination of the committee, for example, a finding of negligence, as would be the situation in a malpractice case. Indeed, the outcome of the committee meeting is already known, that is, Dr. Lazar's privileges were restored. Rather, the government's focus is on the voluntary representations made by Dr. Lazar and his attorneys and any information provided by them and considered by the committee in reaching its decision to restore his privileges. Moreover, the government has sufficiently narrowed the scope of the subpoena. On balance, the court finds that the need for the evidence outweighs the need for confidentiality of the peer review proceedings.

Although the courts are split, the majority of cases to consider the application of similar state peer review statutes in federal question cases have refused to recognize the privilege. *See, e.g., Mem. Hosp. for McHenry County v. Shadur*, 664 F.2d 1058 (7th Cir. 1981) (finding privilege against discovery of hospital disciplinary proceedings created by Illinois Medical Studies Act

did not extend to hospital in federal antitrust action); *Feminist Women's Health Ctr., Inc. v. Mohammed*, 586 F.2d 530, 549 n.9 (5th Cir. 1978); *Nilavar v. Mercy Health Sys.-Western Ohio*, 210 F.R.D. 597 (S.D. Ohio 2002); *Robinson .v Magovern*, 83 F.R.D. 79 (W.D. Pa. 1979).

With regard to Baptist's concerns for patient privacy rights, by order dated March 25, 2004, the court ruled that any documents or pleadings containing confidential patient information filed with the court in the criminal prosecution of Dr. Lazar shall be filed under seal and that no party shall disclose confidential patient information in open court without prior consideration of the court. The same terms of protection will apply to documents disclosed by Baptist in response to this subpoena duces tecum. In addition, information about other unrelated hospital issues and business, including specifically peer review of other doctors, may be redacted from the responsive documents. Because the United States does not seek attorney-client privileged information, the court does not need to address that issue. Baptist need not produce any attorney-client communications.

Baptist's motion to quash is therefore denied, and its motion for protective order is granted on the terms set forth herein.

IT IS SO ORDERED this 22nd day of June, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE

